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IN THE

Supreme Court of the United States

October Term, 1973

Docket No. 73-361

AUGUSTE JOSEPH RICORD,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

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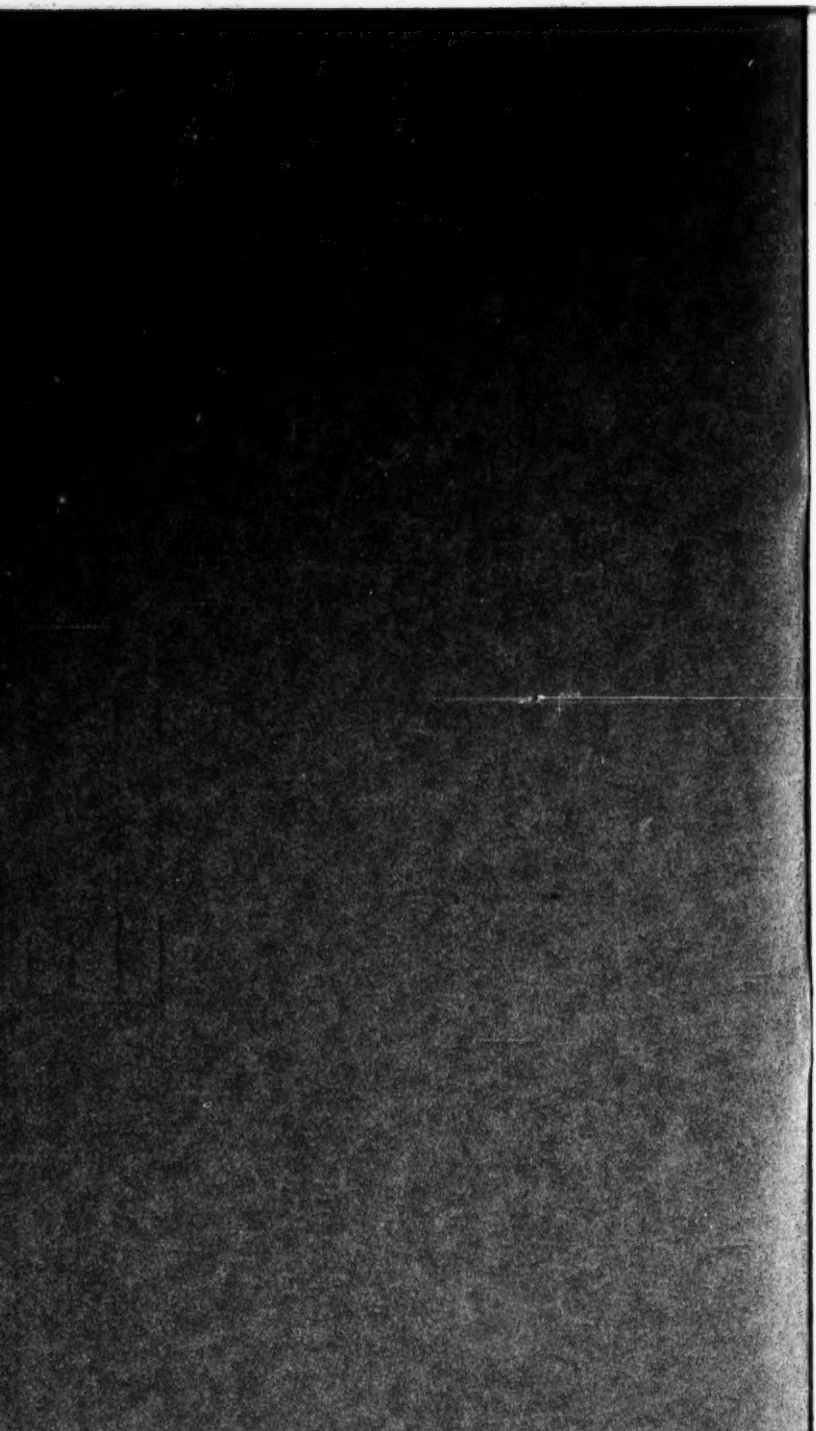

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The Court is respectfully requested to accept the filing of this Reply Brief to the Government's Brief in Opposition to the Petition of Auguste Joseph Ricord for a Writ of Certiorari filed herein. The Petitioner's request is motivated by the fact that the Government in its Brief in Opposition has made certain representations as to the facts, the law and Government arguments which are just not correct.

POINT I

The Law

As to the law, the Government naturally relies on the *Costello* case which was carefully discussed in Petitioner's Brief. The Government has deliberately avoided facing the fact that in the *Costello* case, there were live grand jury witnesses who summarized a vast amount of documentary and other evidence. As pointed out in Petitioner's Brief,

the *Costello* case does not stand for the proposition that a prosecutor has an unlimited right to use hearsay alone if live witnesses are available. In the instant case, we don't even have hearsay for there was not a single witness before the Grand Jury.* The Assistant United States Attorney according to the record was not sworn nor did he testify; he merely read to the Grand Jury which handed down the indictment the minutes of previous Grand Jury proceedings.

This Court is without the benefit of the minutes of the Grand Jury proceedings in this case, because the Trial Judge repeatedly refused to furnish the Petitioner with the minutes of the proceedings or to permit an inspection by Petitioner. In *Costello,* the Grand Jury proceedings had been made available to the defendant and were extensively commented on by this Court in its opinions.

Petitioner submits that what happened in this instant case is for all practical purposes the prosecution by *An Information* of the Prosecutor in complete and absolute derogation of the Constitutional requirement set forth in the Fifth Amendment.

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * *."

There are many who argue that the "Information" method of instituting a criminal prosecution is desirable. However that may be, a Federal Prosecutor can not by-pass the Fifth Amendment requirements of a Grand Jury Indictment, until the Constitution of United States has been amended in such respect.

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* In Petitioner's Brief (p. 7) Assistant United States Attorney Phillips is stated to have been a witness before the Grand Jury. A careful analysis of the record indicates that he was not a witness for in his affidavit referred to on pages 7 and 8, all Phillips said was that he read the Grand Jury minutes relating to the previous indictment.

POINT II

The Government Arguments

The Government in its Brief in Opposition blandly asserts that any infirmities in the present indictment of Petitioner were cured by the fact that there had been an earlier indictment of Petitioner.

This previous indictment involving Petitioner was never tested or explored in any way as the Indictment on which Petitioner was convicted was handed down prior to the determination of any pre-trial proceedings relating to the previous indictment.

The Government makes much of the fact that at the Petitioner's trial, the Government furnished the Petitioner with the testimony of such prosecution witnesses as testified before the Grand Jury which handed down the previous indictment.

Naturally such testimony was made available as within the principles of *Brady* v. *Maryland,* and other court decisions, as well as the requirements of the Jencks Act. However, the record in this case does not include the testimony of such prosecution witnesses but only such limited portions as were used in the cross-examination of such witnesses by Petitioner's counsel.

The Government argues speciously and almost beyond belief that even if the indictment on which Petitioner was convicted was defective because of the failure to call any witnesses or total hearsay, etc., nevertheless such defect was cured by the fact that Petitioner had previously been indicted by a Grand Jury which had heard live witnesses and handed down a valid indictment.

An argument such as this one of the Government's is so preposterous as to create a problem as to how to answer it completely and still succinctly.

First, the minutes of neither of the Grand Jury proceedings are before this Court, except for the limited testimony of prosecution witnesses in connection with the previous indictment used in cross-examination as explained above.

Second, it is impossible to cure a defect in the instant indictment by something which happened prior to the indictment.

Third and very important, due to the trial court's continuous denial of access to the Grand Jury minutes and proceedings, we are dealing with speculation as to *unknowns*.

Fourth, it was the Government's own conduct which created this situation, not the Petitioner's, so that every doubt must be resolved against the prosecution and in favor of Petitioner.

POINT III

The Facts

Government brief page ten:

> "A warrant could not practically have been required, . . ."

Facts: a. The entry of the airplane into the United States was observed by government agents and its movements were followed for over 24 hours before the search.

b. The Government personnel were from the Federal Bureau of Investigation, the Bureau of Narcotics and Dangerous drugs and the United States Department of Customs.

c. These personnel had at their disposal and actually used radio communication, automobiles and airplanes in this surveillance.

d. When the airplane was parked for over twelve hours at the site where the repeated searches took place, there were about ten armed agents surrounding the airplane which was off the runway, tied down and blocked.

e. When the first search on the 19th of October 1970, allegedly revealed one packet of powder, no warrant was obtained prior to the second search the following day.

Government brief page four:

"They had obtained the narcotics from petitioner in Paraguay . . ."

Facts: a. The Government witness Bianchi, an admitted smuggler and liar, is the only one who testified regarding delivery of the narcotics.

b. He swore that he accompanied another man to defendant Ricord's Hotel on two occasions and never had or heard any conversation with Ricord.

c. That the other man went to a hotel room and on each occasion removed ordinary luggage or Christmas gift packages from the room to his car.

d. That on one occasion Ricord helped put the valises in the car trunk.

e. It is undisputed that Ricord built and helped operate the hotel.

There is absolutely no basis for the assumption that the defendant had knowledge or control of the room or luggage of the person occupying a room at his hotel.

Government brief page four:

"$100,000 . . . Varela delivered it to petitioner."

Fact: 1. **One co-conspirator, an admitted liar, said that he saw the defendant Ricord receive one hundred thousand dollars from another alleged conspirator.**

2. **He does not testify to any conversation between defendant and this person who allegedly gave defendant the money nor to any agreement between them as to what the payment was for or indeed whether it related to narcotics at all.**

3. **As noted on page 34 of the Petition, the trial Court erroneously excluded testimony to the effect that at about the same time as this witness was to have brought this cash to Paraguay, another of the conspirators deposited approximately $75,000 in a commercial bank in New York City, which would not have left enough cash to make the alleged Paraguay delivery to Ricord possible.**

POINT IV

The Extradition

The Government's argument is that the acts the United States Government commits outside of the territorial limits of this country are not material to the legality and constitutionality of an extradition nor to the question of jurisdiction over the person of an accused. In effect, this argument goes so far as to say that the judicial branch of the United States Govtrnment can not and will not concern itself with any misconduct on the part of the executive branch of the United States Government where such misconduct takes place outside of the territorial limits of the United States.

We submit that such is not and never has been the law. We further submit that the judicial branch of this Govern-

ment has a duty to put an end to this kind of thinking and this kind of action on the part of our executive branch and its agents and employees.

Petitioner's extradition is a *cause celebre* that has been publicized world wide. Although this shockingly illegal and immoral conduct took place several years ago, it was commented upon a magazine article which was published this month.

> "Under Bahamian law, it seems, only certain kinds of alleged crimes are extraditable offenses. The other two charges, according to the United States Government, did not fill the bill. Perhaps it was the iron logic of Bahamian law, or possibly the military might backing the principled position of Prime Minister Lynden Pindling's government. *In any case, the United States, which once successfully skirted every rule of international law to collar heroin smuggler Auguste Ricord of Argentina, said that it was stymied in Nassau"* (emphasis added). New York Magazine, November 23, 1973.

The leading representative of the United States involved in Petitioner's extradition proceedings in Paraguay, one Nelson Gross, is now under indictment for a similar crime here in this country, which has been well publicized to the embarrassment of the executive branch of the Government.

One of the leading authors on constitutional law and the power of the judiciary in the United States has commented as follows about situations such as Petitioner's.

> "See generally Scott, *Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud,* 37 Minn. L. Rev. 91 (1953). See also Fairman, *Ker* v. *Illinois Revisited,* 47 Am. J. Int'l L. 678 (1953). This doctrine has been seriously questioned where the police illegality is fla-

grant. See Allen, *Due Process and State Criminal Procedures: Another Look,* 48 Nw. U. L. Rev. 16, 27-28 (1953); Scott, supra, at 97-98, Professor Scott predicts that the position taken by the lower *federal* courts that they have jurisdiction to try a defendant abducted from a foreign country 'will doubtless be overruled' when the Supreme Court passes on the question 'in view of the high standards required by the Court of federal law enforcement officers in other areas of law enforcement.' Id. at 100 n. 40.

The proposal has been made that 'no magistrate shall have jurisdiction over any defendant who has been brought before him by virtue of an illegal arrest.' ote, 100 U. Pa. L. Revw. 1182, 1215 (1952). But if a subsequent warrant is properly issued 'there is no reason why the person should not be rearrested, and the officer at least has been taught to respect the law,' ibid.

It has been held that 'Fourth Amendment considerations require that before a person can be extradited * * * the authorities in the asylum state must be satisfied that the affidavit shows probable cause.' *Kirkland* v. *Preston,* 385 F.2d 670 (D.C. Cir. 1967)."

Petitioner submits that respect for law is something which should be required of our Government representatives, agents and agencies wherever they may be and whatever they are doing.

The failure of the Executive Branch of our Government to respect the law and its conduct in putting itself above the law should be curbed or this country will be no different than any other "gestapo state." The last two years have brought to the public attention this cancerous growth in the Executive Branch of the Government which can only be stopped by courageous radical surgery by the Judicial Department of our Government.

CONCLUSION

This conviction must be reversed.

Respectfully submitted,

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